No. 09-1471

FILED

JAN 25 2010

In The
Supreme Court of the United States

SCOTT B. MAYBEE, d/b/a SMARTSMOKER.COM, BUYCHEAPCIGARETTES.COM, and ORDERSMOKESDIRECT.COM,

Petitioner,

vs.

STATE OF IDAHO by and through LAWRENCE G. WASDEN, Attorney General,

Respondent.

On Petition For Writ Of *Certiorari* To The Supreme Court Of Idaho

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO

BRETT T. DELANGE
Counsel of Record
DEPUTY ATTORNEY GENERAL
OFFICE OF ATTORNEY GENERAL
CONSUMER PROTECTION DIVISION
P.O. Box 83720
Boise, ID 83720-0010
Phone: (208) 334-4114
brett.delange@ag.idaho.gov

Attorneys for Respondent State of Idaho

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

RESPONDENT STATE OF IDAHO'S STATEMENT OF THE QUESTIONS PRESENTED

1. Does recent enactment of the Prevent All Cigarette Trafficking Act, Pub. L. No. 111-154, 124 Stat. 1087, render this petition unworthy of the granting of *certiorari*?

2. Does Idaho's regulation of the retail sale and shipment of cigarettes to Idaho consumers in Idaho conflict with the dormant Commerce Clause of the United States Constitution because Petitioner is located in New York?

3. Is Idaho's regulation of the retail sale and shipment of cigarettes to Idaho consumers in Idaho preempted by federal law because Petitioner is a member of the Seneca Indian Nation?

TABLE OF CONTENTS

Page

RESPONDENT STATE OF IDAHO'S STATEMENT OF THE QUESTIONS PRESENTED.... i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT 1

ARGUMENT 8

I. There Is No Compelling Reason to Grant Certiorari 8

II. Idaho's Regulation of the Retail Sale and Shipment of Cigarettes to Idaho Consumers in Idaho Does Not Conflict with the Commerce Clause of the United States Constitution 9

III. Petitioner Did Not Raise Before the Idaho Supreme Court Any Argument that the Complementary and Idaho MSA Acts Conflict With the Import-Export Clause of the United States Constitution or that the Idaho MSA Act Conflicts with the Commerce Clause 12

IV. Idaho's Regulation of the Retail Sale and Shipment of Cigarettes to Idaho Consumers in Idaho Is Not Preempted by Federal Law Because of Petitioner's Status as a Member of the Seneca Indian Nation 15

TABLE OF CONTENTS – Continued

Page

CONCLUSION 24

APPENDIX – RELEVANT EXCERPTS – PUBLIC LAW 111-154 ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997) 13

Dept. of Health and Human Servs. v. Maybee, 965 A.2d 55 (Me. 2009) 8

EEOC v. FLRA, 476 U.S. 19 (1986) 12

Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 13

Freedom Holdings, Inc. v. Spitzer, 357 F.3d 205 (2nd Cir. 2004) 10, 11

Healy v. Beer Institute, Inc., 491 U.S. 324 (1989) 5, 9

Hughes v. Oklahoma, 441 U.S. 322 (1979) 9

Lorillard Tobacco Corp. v. Reilly, 533 U.S. 525 (2001) 13

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) ..... *passim*

Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976) 14

Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976) 22

Nevada v. Hicks, 533 U.S. 353 (2001) 7

N.H. Motor Transp. Ass'n v. Rowe, 377 F. Supp. 2d 197 (D. Me. 2005), *aff'd in part and rev'd in part*, 448 F.3d 66 (1st Cir. 2006), *aff'd*, 552 U.S. 364 (2008) 20

TABLE OF AUTHORITIES – Continued

Page

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).....5, 9

Plains Commerce Bank v. Long Family Land and Cattle Co., 128 S. Ct. 2709 (2008).....21

State v. Maybee, 235 Or. App. 292, 2010 WL 1878752 (Or. Ct. App. May 12, 2010).....8

United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority, 550 U.S. 330 (2007).....5, 9

Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95 (2005).....17, 22

Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980).....22

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).....17, 18, 19, 22

Woodruff v. Parham, 75 U.S. (8 Wall.) 123 (1869).....13

CONSTITUTION AND STATUTES

– FEDERAL

Commerce Clause, Article I, § 8, cl. 3 of the United States Constitution.....5, 9, 11, 14

Import-Export Clause, Article I, § 10, cl. 2 of the United States Constitution.....7, 13, 14

Prevent All Cigarette Trafficking Act ("PACT Act"), Pub. L. No. 111-154, 124 Stat. 1087...3, 8, 20, 23

Pub. L. No. 111-154, 124 Stat. 1109-10, Sec. 5.....23

TABLE OF AUTHORITIES – Continued

Page

15 U.S.C. § 375(5) (2010), *amended by* Pub. L. No. 111-154, 124 Stat. 1088-89 3

15 U.S.C. § 375(6) (2010), *amended by* Pub. L. No. 111-154, 124 Stat. 1089 3

15 U.S.C. § 376a(a) (2010), *amended by* Pub. L. No. 111-154, 124 Stat. 1091 ..... 4, 9, 23

18 U.S.C. § 1716E(a) (2010), *amended by* Pub. L. No. 111-154, 124 Stat. 1103 3

25 U.S.C. § 465 16

42 U.S.C. § 300x-26 19

– STATE

Idaho Code § 39-5701 1

Idaho Code § 39-5702 2

Idaho Code § 39-5704 ..... 1, 2, 5

Idaho Code § 39-5709 ..... 2, 21

Idaho Code § 39-5710 2

Idaho Code § 39-5714 ..... *passim*

Idaho Code § 39-7801 ..... 1, 15

Idaho Code § 39-7803 ..... 13, 14

Idaho Code § 39-8401 ..... 10, 15, 21

Idaho Code § 39-8403 ..... 3, 5

Idaho Prevention of Minors' Access to Tobacco Act, title 39, chapter 57, Idaho Code ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Idaho Tobacco Master Settlement Agreement Act, title 39, chapter 78, Idaho Code.....*passim*

Idaho Tobacco Master Settlement Agreement Complementary Act, title 39, chapter 84, Idaho Code.....1

RULES

U.S. Supreme Court Rule 10.....8

OTHER AUTHORITIES

2003 Idaho Sess. Laws. ch. 273.....2

The Idaho Directory of Compliant Tobacco Product Manufacturers and Brand Families, http://www2.state.id.us/ag/consumer/tobacco/directory_index.htm.....2, 3

The Master Settlement Agreement, http://www2.state.id.us/ag/consumer/tobacco/MSA.pdf.....13

STATEMENT

The State of Idaho heavily regulates the sale and shipment of cigarettes in Idaho. The Idaho Legislature has stated its reasons for such regulation: Noting that the Surgeon General has determined that smoking causes lung cancer, heart disease, and other serious diseases, the Legislature found that smoking poses serious public health and financial concerns for Idaho. *See* Idaho Code § 39-7801(a)-(c). Equally of concern, as expressed by the Legislature, is youth access to and usage of tobacco products. *See* Idaho Code § 39-5701.

Idaho has responded to these concerns with the enactment of a variety of laws regulating the sale of tobacco products in Idaho, two of which are relevant to this case: (1) Idaho's Prevention of Minors' Access to Tobacco Act ("Minors' Access Act"), codified at title 39, chapter 57, Idaho Code; and (2) Idaho's Tobacco Master Settlement Agreement Complementary Act ("Complementary Act"), codified at title 39, chapter 84, Idaho Code.

The Minors' Access Act is designed to reduce youth access to and usage of tobacco products. One way the Idaho Legislature seeks to accomplish this goal is section 39-5704 of the Act, which prohibits the sale, distribution, or offering of tobacco products at retail without the retailer having first obtained a tobacco permit from the Idaho Department of Health and Welfare. Tobacco permittees are subject to Department oversight and statutory regulation, including

inspections and compliance checks regarding their duties under the Act. *See* Idaho Code §§ 39-5704 and 39-5710. Section 39-5709 of the Act states that the sale or distribution of tobacco products without a permit is considered "an effort to subvert the state's public purpose to prevent minor's access to tobacco products."

In 2003, the Idaho Legislature expanded the scope of the Minors' Access Act to cover tobacco products sold over the Internet. *See* 2003 Idaho Sess. Laws. ch. 273. Such sales are defined as "delivery sales" by Section 39-5702(2) of the Act. The Legislature made clear that Internet tobacco retailers are to comply with all regulation of tobacco sales applicable to the more traditional ways in which tobacco products are sold and used, including, without limitation, compliance with the Complementary Act. *See* Idaho Code § 39-5714 of the Minors' Access Act.

The Complementary Act governs which cigarettes and which tobacco companies can sell cigarettes in Idaho. It requires, in part, that all tobacco companies whose cigarettes are sold in Idaho first certify themselves and their cigarette brands for sale with the Idaho Attorney General. The Act also establishes the Idaho Directory of Compliant Tobacco Product Manufacturers and Brand Families ("Idaho Directory") and requires the Idaho Attorney General to list on this Directory only those tobacco companies and their brand families that have been certified for sale in

Idaho. *See* Idaho Code § 39-8403.[1] Relevant to this case, section 39-8403 of the Complementary Act makes it unlawful for any person to sell, offer or possess for sale in Idaho cigarettes of a tobacco company or brand family not included on the Idaho Directory.

The federal government, too, regulates tobacco products. Recently, and relevant to this appeal, Congress enacted the Prevent All Cigarette Trafficking Act ("PACT Act"). Pub. L. No. 111-154, 124 Stat. 1087. The PACT Act amends federal law in a variety of ways. In addition to now generally prohibiting the Post Office from mailing cigarettes, *see* 18 U.S.C. § 1716E(a) (2010), *amended by* Pub. L. No. 111-154, 124 Stat. 1103, App. 6, the PACT Act amends the Jenkins Act to cover Internet cigarette sellers such as Petitioner.[2] Significant to this appeal, the PACT Act amends the Jenkins Act to provide that delivery sellers such as Petitioner comply with "all State, local, tribal and other laws generally applicable to sales of cigarettes or smokeless tobacco **as if the delivery sales occurred entirely within the specific State**

[1] The Idaho Attorney General has made the Idaho Directory available online at http://www2.state.id.us/ag/consumer/tobacco/directory_index.htm.

[2] Specifically, the PACT Act amends the Jenkins Act by defining the term "delivery sale" as the sale of cigarettes where the consumer submits the order for the cigarettes by means of a telephone, the mails, the Internet or other online service and the term "delivery seller" as one who makes a delivery sale. *See* 15 U.S.C. § 375(5) and (6) (2010), *amended by* Pub. L. No. 111-154, 124 Stat. 1088-89, App. 2-3.

and place." 15 U.S.C. § 376a(a)(3) (2010), *amended by* Pub. L. No. 111-154, 124 Stat. 1091, App. 5 (emphasis supplied). Thus, federal law mandates that Petitioner, with respect to his Internet cigarette sales to consumers located in Idaho, comply with Idaho state tobacco sales laws such as the Minors' Access and Complementary Acts.

The material facts that were before Idaho's courts and that are before this Court must be viewed against this background. Those facts, in brief summary, establish:

(1) Petitioner sold, collected money from, and shipped millions of cigarettes to Idaho consumers, over 2.5 million of which are of cigarette brands that have been and are still today illegal under the Complementary Act to be sold in Idaho, because the cigarettes Petitioner was selling were not listed on the Idaho Directory;

(2) Idaho consumers paid, signed for, and received these cigarettes in Idaho; and

(3) Petitioner sold, collected money from, and shipped the cigarettes at issue to Idaho consumers in Idaho without his obtaining the tobacco permit required by the Minors' Access Act.

See Pet. App. 8, 12, 32-33.

Petitioner's violations of the Complementary Act are apparent. As previously noted, the Act, in part,

prohibits "any person" from selling, offering, or possessing for sale in Idaho "cigarettes of a tobacco product manufacturer or brand family not included in the directory." Idaho Code § 39-8403(3)(b). The undisputed fact is that Petitioner sold 2.5 million cigarettes to Idahoans that were never on the Idaho Directory. Petitioner's violations of the Minors' Access Act are no less apparent. Despite selling millions of these cigarettes at retail to Idaho consumers, Petitioner never applied for nor held a tobacco permit as required by Idaho Code Section 39-5704 of that Act.

Petitioner raised various issues before the Idaho Supreme Court, three of which he pursues here. With respect to his claim that the Complementary Act violates the Commerce Clause, the Idaho Supreme Court correctly noted that state legislation may violate the dormant Commerce Clause if it (1) facially discriminates in favor of intrastate interests, *citing United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330, 338 (2007); (2) places a burden on commerce outweighed by its local benefits, *citing Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); or (3) attempts to regulate conduct occurring entirely outside the State, *citing Healy v. Beer Institute, Inc.*, 491 U.S. 324, 336 (1989). Pet. App. 23-25.

Applying these rules, the Idaho Supreme Court noted that the Complementary Act does not discriminate against interstate commerce and does not benefit in-state economic interests at the expense of out-of-state economic interests. Further, the Court

ruled that the burdens on interstate commerce do not outweigh the local benefits of the Complementary Act's regulation. Finally, the Court stated that the Complementary Act does not regulate commerce occurring wholly outside Idaho's boundaries, but only those sales to Idaho consumers who are located, pay for, and receive shipment of the cigarettes in Idaho. Pet. App. 25-27. Accordingly, the Court correctly found that the Complementary Act does not violate the Commerce Clause.

Petitioner also claimed below that federal common law preempted application of Idaho law to his business operations because he is a member of the Seneca Indian Nation, living and conducting business on his reservation in New York. The Idaho Supreme Court decided this issue by explaining that whether the Complementary Act is preempted depends upon (1) whether the conduct at issue occurs on or off reservation; (2) whether the party being regulated is a tribal member; and (3) if the regulated conduct occurs on reservation, whether State interests outside the reservation are implicated. Pet. App. 31.[3]

The Idaho Supreme Court acknowledged that Petitioner is a member of the Seneca Indian Nation. The Court found, though, that neither the Minors' Access nor the Complementary Act regulates his on-reservation activities. Instead, the Acts apply to his

[3] Petitioner agrees that this is the correct methodology to utilize. Pet. 31.

off-reservation activities of selling at retail and shipping to consumers in Idaho, without the necessary Minors' Access Act permit, cigarettes that are not listed on the Idaho Directory in violation of the Complementary Act. The Court noted that a concern of the Complementary Act is introducing "Non-compliant Cigarettes into Idaho" and a concern of the Minors' Access Act is introducing tobacco products "into Idaho," at retail, by those without a permit to do so. Pet. App. 33.

Relying on *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), and *Nevada v. Hicks*, 533 U.S. 353 (2001) for the proposition that "absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State," *Mescalero Apache*, 411 U.S. at 148-49, the Idaho Supreme Court found no conflicting federal law and that the Acts are non-discriminatory in application. Accordingly, the Court concluded that the Minors' Access and Complementary Acts are not preempted by operation of federal law. Pet. App. 33-34.

The Idaho Supreme Court did not rule on two issues that Petitioner raises here, because Petitioner never raised them before now. The first is whether the Import-Export Clause, Article I, §10, cl. 2 of the United States Constitution, invalidates the Complementary Act and another Idaho law, the Idaho Tobacco Master Settlement Agreement Act ("MSA Act"), codified at title 39, chapter 78, Idaho Code. The

second is whether the Commerce Clause preempts the MSA Act.

ARGUMENT

I. There Is No Compelling Reason to Grant *Certiorari*

Rule 10 of the Supreme Court Rules provides that a writ of *certiorari* is a matter for judicial discretion, and will be granted **only** for compelling reasons. The Idaho Supreme Court's decision in this case and its application of applicable law do not conflict with any decision of this Court, do not conflict with any decision of any other Circuit Court, and do not conflict with a decision of any state court of last resort, let alone any state appellate court. Indeed, the Idaho Supreme Court's decision is consistent with those appellate courts that have reviewed the very issues Petitioner raises here.[4] Further, Congress has made clear that Petitioner, with respect to his Internet cigarette sales to Idaho consumers, must comply with the very Idaho tobacco sales laws that Petitioner objects to in his *certiorari* petition. The PACT Act, in short, eviscerates any ongoing significance of the issues as to which Petitioner seeks review.

[4] Petitioner is the named party in the two other appellate decisions to rule on the same issues in the same way that the Idaho Supreme Court ruled. *See Dept. of Health and Human Servs. v. Maybee*, 965 A.2d 55 (Me. 2009); *State v. Maybee*, 235 Or. App. 292, 2010 WL 1878752 (Or. Ct. App. May 12, 2010).

II. Idaho's Regulation of the Retail Sale and Shipment of Cigarettes to Idaho Consumers in Idaho Does Not Conflict with the Commerce Clause of the United States Constitution

Petitioner contends that the Complementary Act violates the Commerce Clause. Putting aside, as discussed above, that federal law specifically requires Petitioner to comply with this Act "as if [his] delivery sales occurred entirely within" the State of Idaho, *see* 15 U.S.C. § 376a(a)(3) (2010), *amended by* Pub. L. No. 111-154, 124 Stat. 1091, App. 5, there is no Commerce Clause violation.

While the Commerce Clause generally is invoked as authority for federal legislation, the so-called dormant component limits the States' ability to enact legislation that adversely affects interstate commerce. *See Hughes v. Oklahoma*, 441 U.S. 322 (1979). The Idaho Supreme Court is correct that state legislation such as the Complementary Act may violate the dormant component of the Commerce Clause if (1) it facially discriminates in favor of intrastate interests; *see United Haulers Ass'n*, 550 U.S. at 338; (2) it places a burden on commerce outweighed by its local benefits, *see Pike*, 397 U.S. at 142; or (3) it attempts to regulate conduct occurring entirely outside the State, *see Healy*, 491 U.S. at 336. Here, however, none of these concerns exists.

First, the Complementary Act does not discriminate against Petitioner or other out-of-state Internet

cigarette sellers in favor of intrastate cigarette retailers and does not impose additional burdens on him as an out-of-state retailer. It also does not benefit in-state economic interests at the expense of out-of-state economic interests. No matter where a retailer resides, that individual or entity may sell and ship to Idahoans in Idaho only the cigarette brands of the manufacturers listed on Idaho's Directory.

Second, the burden on interstate commerce is not greater than or excessive of the benefit conferred by the Complementary Act. The Idaho Legislature declared when enacting the Complementary Act that its passage would, in part, safeguard "the fiscal soundness of the state and the public health." Idaho Code § 39-8401. Further, as noted by the Second Circuit Court of Appeals in *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 218 (2nd Cir. 2004), in a case addressing essentially the same issue raised now before this Court,

> **Any incidental burdens on products originating out-of-state** – i.e., the so-called embargoing of the cigarettes of NPMs purchased by appellants **is a result of their failure to comply with the Escrow and Contraband Statutes**, a burden that is no greater for out-of-state economic interests than for in-state ones.

(Internal citations and quotations omitted; emphasis supplied).[5]

Third, the Complementary Act does not regulate commerce occurring **wholly outside** Idaho's border. The Act applies and seeks to regulate only the retail sale of tobacco products that are purchased by and shipped to consumers in Idaho. While the stream of commerce flows back and forth between Petitioner's New York retail operation and Idaho consumers, such commerce occurs as much, if not more, inside Idaho's borders where the cigarettes are ordered, paid for, and received by Idaho consumers.

In summary, Petitioner's Commerce Clause claim lacks merit. And given Congress' decree that Internet cigarette sellers like Petitioner comply with the Complementary Act "as if [his] delivery sales occurred entirely within" Idaho, it is even clearer that this issue is not worthy of *certiorari* being granted. The PACT Act eliminates any claimed importance of the dormant Commerce Clause question raised by Petitioner.

---

[5] In *Freedom Holdings*, several cigarette importers argued that New York's tobacco laws (termed "contraband statutes" by the court there and serving the functionally equivalent purpose as the Complementary Act here) violated, among other things, the dormant Commerce Clause. *See id.* at 209. The Second Circuit rejected the plaintiffs' Commerce Clause claim in that case.

III. Petitioner Did Not Raise Before the Idaho Supreme Court Any Argument that the Complementary and Idaho MSA Acts Conflict With the Import-Export Clause of the United States Constitution or that the Idaho MSA Act Conflicts with the Commerce Clause

Petitioner did not raise before the Idaho Supreme Court the issue of whether the Complementary Act or the MSA Act conflicts with the Import-Export Clause of the United States Constitution. Petitioner also did not raise the issue of whether the MSA Act conflicts with the Commerce Clause of the United States Constitution. As such, this Court should not address the issues. *EEOC v. FLRA*, 476 U.S. 19, 24 (1986) ("Our normal practice, from which we see no reason to depart on this occasion, is to refrain from addressing issues not raised in the Court of Appeals"). Even if the Court were to address either issue, however, *certiorari* should not be granted with respect to these two Idaho laws and the issues raised here for the first time.

First, with respect to the MSA Act, the reason this issue was not raised below is because the law does not apply to Petitioner and his Internet cigarette sales business. The basic provisions of the MSA Act require all tobacco **manufacturers** whose cigarettes are sold in Idaho either to (1) execute the Master

Settlement Agreement[6] and become subject to its obligations, or (2) deposit into a "qualified escrow fund" a fixed sum for each cigarette that has been taxed and stamped with an Idaho excise tax stamp. *See* Idaho Code § 39-7803. Petitioner is not a tobacco product manufacturer but an Internet cigarette **retailer**. He has no obligations under the MSA Act. He was not pursued by Idaho for any violation of this law. His desire to challenge the MSA Act here, after the Idaho courts have reviewed the various issues he did raise before them, is not appropriate and should not be allowed.

Second, the Import-Export Clause does not apply either to the Complementary or MSA Acts. The Import-Export Clause, Article I, § 10, cl. 2, provides that "[n]o State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports." Putting aside the debate of whether this clause is limited to foreign trade, *compare Woodruff v. Parham*, 75 U.S. (8 Wall.) 123 (1869), *with Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520

[6] In November 1998, leading United States tobacco companies entered into a settlement agreement, entitled the "Master Settlement Agreement," or "MSA" with Idaho. The MSA has been described by this Court as a "landmark" public health agreement, *Lorillard Tobacco Corp. v. Reilly*, 533 U.S. 525, 533 (2001), that addresses "one of the most troubling public health problems facing the Nation today." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000). The MSA is a lengthy public document. The Idaho Attorney General has made the MSA electronically available at: http://www2.state.id.us/ag/consumer/tobacco/MSA.pdf.

U.S. 564, 624-36 (1997) (Thomas, J., dissenting), it is undisputed that what the Clause is directed at is the levy of certain **taxes**. *See, e.g., Michelin Tire Corp. v. Wages*, 423 U.S. 276, 287 (1976) ("[I]mposts and duties . . . are essentially taxes on the commercial privilege of bringing goods into a country"). This is important because neither the Complementary Act nor the MSA Act imposes any tax.

It is true that the MSA Act requires tobacco companies that opt not to join the MSA to deposit money into an escrow account for certain cigarettes that are sold in Idaho. The MSA Act provides, however, that tobacco manufacturers which place funds into escrow shall receive the interest or other appreciation on such funds as earned which may ultimately, after 25 years, be returned to the tobacco manufacturer if Idaho does not obtain a judgment against the company based upon a claim or claims related to the use, sale, marketing, or distribution of its tobacco products. Idaho Code § 39-7803(b)(2). In short, the escrow deposit requirements of the MSA Act are not tax assessments and the Import-Export Clause offers Petitioner no refuge.

Third, the MSA Act does not violate the Commerce Clause. It does not discriminate against interstate commerce and does not benefit in-state economic interests at the expense of out-of-state economic interests. No matter where a manufacturer resides, that company may sell and ship to Idaho its various cigarette brands if compliant with the uniformly applicable provisions of the MSA Act. The Act's

burden on interstate commerce, to the degree there is such a burden, is not greater than or excessive of the benefit conferred by its provisions. *See* Idaho Code § 39-7801 (setting forth the various state interests served by enactment of the MSA Act). Idaho deems these interests critical. Indeed, when it became clear to the Legislature that too many tobacco companies were violating the MSA Act and undermining the interests that Act is designed to serve, it enacted the Complementary Act to bolster enforcement. *See* Pet. App. 3-4; Idaho Code § 39-8401. Finally, the MSA Act does not regulate commerce occurring **wholly outside** Idaho's border. It applies and seeks to regulate only the sale of stamped, tax-collected cigarettes that are sold to purchasers in Idaho.

IV. Idaho's Regulation of the Retail Sale and Shipment of Cigarettes to Idaho Consumers in Idaho Is Not Preempted by Federal Law Because of Petitioner's Status as a Member of the Seneca Indian Nation

A. In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), this Court was asked to prohibit New Mexico from imposing a gross receipts tax on revenue generated from a tribal ski resort and a use tax on materials employed in constructing the resort's lifts. The resort was located just outside the tribe's reservation on land leased from the United States Forest Service. *Id.* at 146. The resort's location was critical because "in the special area of state taxation, absent cession of jurisdiction or other federal statutes

permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation." *Id.* at 148. "[T]ribal activities conducted outside the reservation present different considerations[,]" however, and in that situation "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Id.* at 148-49.

With that principle in mind, this Court found the gross receipts tax permissible, given the resort's location, but deemed the use tax preempted by virtue of a provision in the Indian Reorganization Act, 25 U.S.C. § 465, that proscribes taxation of land taken into trust for a tribe or tribal member. On the latter point, it reasoned that "the lease arrangement here in question was sufficient to bring the Tribe's interest in the land within the immunity afforded by § 465," 411 U.S. at 155 n.11, since the ski lifts had been permanently attached to the land and "[t]he jurisdictional basis for use taxes is the use of the **property** in the State." *Id.* at 158 (emphasis supplied). The differing result with regard to the use tax thus derived from the combination of an explicit congressional directive satisfying the "express federal law to the contrary" exception to the general rule and the nature of the conduct that triggered the tax obligation as a matter of state law.

This Court applied *Mescalero Apache* most recently in *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005), where it upheld imposition of a state fuel tax on an off-reservation distributor with respect to purchases by a tribal retailer for on-reservation sale. This Court rejected the proposition that the tax's validity must be assessed under the interest-balancing test governing on-reservation transactions prescribed in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), because "[w]e have taken an altogether different course, by contrast, when a State asserts its taxing authority outside of Indian Country." 546 U.S. at 112. That "altogether different course" was *Mescalero Apache* which controlled in light of the off-reservation "where" of the Kansas fuel tax – *i.e.*, the fact that the tax accrued upon receipt of the fuel by the distributor at its off-reservation place of business. This Court reasoned that "the 'use, sale or delivery' that **triggers** tax liability is the sale or delivery of the fuel to the distributor." *Id.* at 107 (emphasis supplied).

Mescalero Apache and *Wagnon* establish the fundamental framework against which Petitioner's Indian law-based preemption claim must be measured. The requirements of the Complementary and Minors' Access Acts, as made clear by the Idaho Supreme Court in interpreting these two Acts, are "trigger[ed]" for present purposes by his **introduction** of tobacco into Idaho, not by the simple fact that an Idaho resident chooses to purchase cigarettes from a vendor whose physical place of business is located outside

the State. If an Idaho resident traveled to New York to purchase and receive his cigarettes, the Acts would not apply. The critical "where" of the transaction is thus Idaho, not Petitioner's New York place of business. Petitioner is treated no differently than other remote vendors, and the fact that he is located on his tribe's reservation adds nothing to his cause since that fact has no Supremacy Clause significance under this Court's Indian law jurisprudence.

In short, Petitioner's liability for violating the Complementary Act arises from selling and shipping to Idaho consumers cigarettes that are not on the Idaho Directory, while his violation of the Minors' Access Act stems from failure to obtain a tobacco permit for those retail cigarette sales. Neither of these violations depends upon where he does business; *i.e.*, the "trigger[ing]" event for statutory coverage is the fact that he causes cigarettes to be introduced into this State.

B. Before this Court, Petitioner focuses his appeal on the Idaho Supreme Court's decision not to apply this Court's interest-balancing test for analyzing on-reservation transactions prescribed in *Bracker*, 448 U.S. at 144. Petitioner's argument is that because he is on his reservation, this is enough to require *Bracker's* interest balancing test to be employed. Pet. 33. Petitioner's argument fails at least for two reasons.

First, and tellingly, Petitioner does not show, or attempt to show, that application of the *Bracker* test

here would have changed the result. *Bracker* involved the question whether Arizona could impose motor carrier license and use fuel taxes on a nontribal firm with respect to on-reservation timber hauling undertaken pursuant to a contract with the resident tribe. In answering this question, this Court set out an analytical test that subsequently has been employed when a State regulates commercial transactions between tribes and nonmembers on reservation:

> In such cases we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.

448 U.S. at 144-45. Here, those interests manifestly weigh against Petitioner.

Federal law – specifically 42 U.S.C. § 300x-26 – encourages states to adopt laws – such as the Minors' Access Act – that prohibit sales of tobacco products to persons under the age of 18 by providing grants from the Department of Health and Human Services. As discussed above, the PACT Act also directs Internet

cigarette sellers like Petitioner to comply with Idaho's tobacco sales laws. Congress thus has affirmatively approved and indeed required compliance with State regulatory schemes like the Minors' Access and Complementary Acts. This congressional affirmation of state authority is, Idaho respectfully suggests, as relevant to pre-PACT Act transactions as to those now for purpose of assessing Idaho's regulatory interests. For *Bracker*-based analytical purposes, therefore, the federal interest militates strongly toward these Acts' enforceability here.

Idaho's interest in preventing minors from smoking is obvious and singularly compelling. *See N.H. Motor Transp. Ass'n v. Rowe*, 377 F. Supp. 2d 197, 206 (D. Me. 2005) ("Given the deadly health consequences, there are no persuasive arguments for allowing minors to have tobacco products. Thus, it is hard to believe that, if Congress were confronted now with the specific question whether Maine should be able to take steps to protect the health of its children, Congress would vote to prohibit what Maine is trying to do"), *aff'd in part and rev'd in part*, 448 F.3d 66 (1st Cir. 2006), *aff'd*, 552 U.S. 364 (2008).

The permit requirement of the Minors' Access Act contributes to Idaho's efforts at controlling the ability of minors to obtain tobacco by ensuring that the Idaho Department of Health and Welfare has a central repository of all businesses marketing tobacco to Idaho residents with a uniform set of data which facilitates compliance monitoring and, where necessary, enforcement actions. Moreover, as noted above,

the Minors' Access Act explicitly provides that the retail sale or distribution of tobacco products without a permit is to be considered "an effort to subvert the state's public purpose to prevent minor's access to tobacco products." Idaho Code § 39-5709. The Complementary Act comparably provides that, with respect to the State's interest in regulating which cigarettes can be sold in Idaho, Idaho's fiscal soundness and the public health are at stake. *See* Idaho Code § 39-8401.

Petitioner, moreover, does not make even a colorable attempt to identify a compelling tribal interest furthered by prohibiting Idaho from regulating the introduction of a concededly dangerous product into its jurisdiction for purposes of in-state consumption. Plainly enough, such regulation does not touch upon the control of internal relations that serves as the touchstone for determining the reach of tribal self-governance. *E.g.*, *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 128 S. Ct. 2709, 2719 (2008) ("the tribes have, by virtue of their incorporation into the American republic, lost 'the right of governing . . . person[s] within their limits except themselves'").

Finally, to characterize the burden on Petitioner of submitting annually to a no-charge permit application for his operations as "minimal," if anything, overstates the impact; the burden is virtually non-existent. The Minors' Access Act permit obligation is easily discharged. Indeed, it is far less intrusive on Petitioner's time and resources than the

record-keeping and tax collection duties approved by this Court in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 483 (1976), and *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 151 (1980). Similarly, Petitioner does not explain the undue burden of selling only those cigarettes that are listed on the Idaho Directory.[7]

Second, while application of the *Bracker* interest-balancing analysis supports Idaho here, the Idaho Supreme Court was correct in ruling that *Bracker* does not apply in this case. This Court has made clear, most recently in *Wagnon*, 546 U.S. at 112, that where the regulated conduct occurs off reservation, *Bracker* interest-balancing has no analytical role in determining a preemption challenge. And given, as the Idaho Supreme Court ruled, that the Minors' Access and Complementary Acts regulate the **introduction into Idaho of cigarettes sold to Idaho consumers located in Idaho**, the regulated conduct in this case is off reservation. In such circumstances, the analysis to be employed, first set forth by this Court in *Mescalero Apache*, 411 U.S. at 148-49, controls. Tellingly, Petitioner does not even attempt to contend that under *Mescalero Apache* federal law preempts the Minors' Access or Complementary Acts.

[7] A review of Idaho's Tobacco Directory reveals that at present there are 36 tobacco companies selling 179 different cigarette brands that may be lawfully sold in Idaho.

The reason is clear: Under that analysis neither Act is preempted by federal law.[8]

---

[8] Nothing in the PACT Act alters these Indian law principles. *See* Pub. L. No. 111-154, Stat. 1109-10, Sec. 5, App. 7-9. Further, given that the PACT Act requires delivery sellers like Petitioner to comply with "all State, local, tribal and other laws generally applicable to sales of cigarettes or smokeless tobacco as if the delivery sales occurred entirely within the specific State and place," 15 U.S.C. § 376a(a)(3), *amended by* Pub. L. No. 111-154, 124 Stat. 1091, App. 5, Petitioner's post-PACT Act sales to Idaho consumers constitute off-reservation activity for purposes of applying *Mescalero Apache*. As with the dormant Commerce Clause challenge, therefore, Congress' action eliminates any purported importance of Petitioner's Supremacy Clause claim as an ongoing matter.

CONCLUSION

The State of Idaho respectfully requests that the instant Petition be denied.

Respectfully submitted this 25th day of June, 2010.

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO

BRETT T. DELANGE
Counsel of Record
DEPUTY ATTORNEY GENERAL
OFFICE OF ATTORNEY GENERAL
CONSUMER PROTECTION DIVISION
P.O. Box 83720
Boise, ID 83720-0010
Phone: (208) 334-4114
Fax: (208) 334-4151

Attorneys for Respondent
State of Idaho

RELEVANT EXCERPTS – PUBLIC LAW 111-154

* * *

SEC. 2. COLLECTION OF STATE CIGARETTE AND SMOKELESS TOBACCO TAXES.

(a) DEFINITIONS. – The Act of October 19, 1949 (15 U.S.C. 375 et seq.; commonly referred to as the "Jenkins Act") (referred to in this Act as the "Jenkins Act"), is amended by striking the first section and inserting the following:

"SECTION 1. DEFINITIONS.

"As used in this Act, the following definitions apply:

"(1) ATTORNEY GENERAL. – The term 'attorney general', with respect to a State, means the attorney general or other chief law enforcement officer of the State.

"(2) CIGARETTE. –

"(A) IN GENERAL. – The term 'cigarette' –

"(i) has the meaning given that term in section 2341 of title 18, United States Code; and

"(ii) includes roll-your-own tobacco (as defined in section 5702 of the Internal Revenue Code of 1986).

"(B) EXCEPTION. – The term 'cigarette' does not include a cigar (as defined in section 5702 of the Internal Revenue Code of 1986).

"(3) COMMON CARRIER. – The term 'common carrier' means any person (other than a local messenger service or the United States Postal Service) that holds itself out to the general public as a provider for hire of the transportation by water, land, or air of merchandise (regardless of whether the person actually operates the vessel, vehicle, or aircraft by which the transportation is provided) between a port or place and a port or place in the United States.

"(4) CONSUMER. – The term 'consumer' –

"(A) means any person that purchases cigarettes or smokeless tobacco; and

"(B) does not include any person lawfully operating as a manufacturer, distributor, wholesaler, or retailer of cigarettes or smokeless tobacco.

"(5) DELIVERY SALE. – The term 'delivery sale' means any sale of cigarettes or smokeless tobacco to a consumer if –

"(A) the consumer submits the order for the sale by means of a telephone or other method of voice transmission, the mails, or the Internet or other online service, or the seller is otherwise not in the physical presence of the buyer when the request for purchase or order is made; or

"(B) the cigarettes or smokeless tobacco are delivered to the buyer by common carrier, private delivery service, or other method of remote delivery, or the seller is not in the physical presence

of the buyer when the buyer obtains possession of the cigarettes or smokeless tobacco.

"(6) DELIVERY SELLER. – The term 'delivery seller' means a person who makes a delivery sale.

"(7) INDIAN COUNTRY. – The term 'Indian country' –

"(A) has the meaning given that term in section 1151 of title 18, United States Code, except that within the State of Alaska that term applies only to the Metlakatla Indian Community, Annette Island Reserve; and

"(B) includes any other land held by the United States in trust or restricted status for one or more Indian tribes.

"(8) INDIAN TRIBE. – The term 'Indian tribe', 'tribe', or 'tribal' refers to an Indian tribe as defined in section 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(e)) or as listed pursuant to section 104 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 479a-1).

"(9) INTERSTATE COMMERCE. –

"(A) IN GENERAL. – The term 'interstate commerce' means commerce between a State and any place outside the State, commerce between a State and any Indian country in the State, or commerce between points in the same State but through any place outside the State or through any Indian country.

"(B) INTO A STATE, PLACE, OR LOCALITY. – A sale, shipment, or transfer of cigarettes or smokeless tobacco that is made in interstate commerce, as defined in this paragraph, shall be deemed to have been made into the State, place, or locality in which such cigarettes or smokeless tobacco are delivered.

"(10) PERSON. – The term 'person' means an individual, corporation, company, association, firm, partnership, society, State government, local government, Indian tribal government, governmental organization of such a government, or joint stock company.

"(11) STATE. – The term 'State' means each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

"(12) SMOKELESS TOBACCO. – The term 'smokeless tobacco' means any finely cut, ground, powdered, or leaf tobacco, or other product containing tobacco, that is intended to be placed in the oral or nasal cavity or otherwise consumed without being combusted.

"(13) TOBACCO TAX ADMINISTRATOR. – The term 'tobacco tax administrator' means the State, local, or tribal official duly authorized to collect the tobacco tax or administer the tax law of a State, locality, or tribe, respectively.

* * *

"SEC. 2A. DELIVERY SALES.

"(a) IN GENERAL. – With respect to delivery sales into a specific State and place, each delivery seller shall comply with

"(1) the shipping requirements set forth in subsection (b);

"(2) the recordkeeping requirements set forth in subsection (c);

"(3) all State, local, tribal, and other laws generally applicable to sales of cigarettes or smokeless tobacco as if the delivery sales occurred entirely within the specific State and place, including laws imposing: –

"(A) excise taxes;

"(B) licensing and tax-stamping requirements;

"(C) restrictions on sales to minors; and

"(D) other payment obligations or legal requirements relating to the sale, distribution, or delivery of cigarettes or smokeless tobacco; and

"(4) the tax collection requirements set forth in subsection (d).

* * *

SEC. 3. TREATMENT OF CIGARETTES AND SMOKELESS TOBACCO AS NONMAILABLE MATTER.

(a) IN GENERAL. – Chapter 83 of title 18, United States Code, is amended by inserting after section 1716D the following:

"§ 1716E. Tobacco products as nonmailable

"(a) PROHIBITION. –

"(1) IN GENERAL. – All cigarettes and smokeless tobacco (as those terms are defined in section 1 of the Act of October 19, 1949, commonly referred to as the Jenkins Act) are nonmailable and shall not be deposited in or carried through the mails. The United States Postal Service shall not accept for delivery or transmit through the mails any package that it knows or has reasonable cause to believe contains any cigarettes or smokeless tobacco made nonmailable by this paragraph.

"(2) REASONABLE CAUSE. – For the purposes of this subsection reasonable cause includes –

> "(A) a statement on a publicly available website, or an advertisement, by any person that the person will mail matter which is nonmailable under this section in return for payment, or
>
> "(B) the fact that the person is on the list created under section 2A(e) of the Jenkins Act.

* * *

SEC. 5. EXCLUSIONS REGARDING INDIAN TRIBES AND TRIBAL MATTERS.

(a) IN GENERAL. – Nothing in this Act or the amendments made by this Act shall be construed to amend, modify, or otherwise affect –

(1) any agreements, compacts, or other intergovernmental arrangements between any State or local government and any government of an Indian tribe (as that term is defined in section 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(e)) relating to the collection of taxes on cigarettes or smokeless tobacco sold in Indian country;

(2) any State laws that authorize or otherwise pertain to any such intergovernmental arrangements or create special rules or procedures for the collection of State, local, or tribal taxes on cigarettes or smokeless tobacco sold in Indian country;

(3) any limitations under Federal or State law, including Federal common law and treaties, on State, local, and tribal tax and regulatory authority with respect to the sale, use, or distribution of cigarettes and smokeless tobacco by or to Indian tribes, tribal members, tribal enterprises, or in Indian country;

(4) any Federal law, including Federal common law and treaties, regarding State jurisdiction, or lack thereof, over any tribe, tribal members, tribal enterprises, tribal reservations, or other lands held by the

United States in trust for one or more Indian tribes; or

(5) any State or local government authority to bring enforcement actions against persons located in Indian country.

(b) COORDINATION OF LAW ENFORCEMENT. – Nothing in this Act or the amendments made by this Act shall be construed to inhibit or otherwise affect any coordinated law enforcement effort by 1 or more States or other jurisdictions, including Indian tribes, through interstate compact or otherwise, that –

(1) provides for the administration of tobacco product laws or laws pertaining to interstate sales or other sales of tobacco products;

(2) provides for the seizure of tobacco products or other property related to a violation of such laws; or

(3) establishes cooperative programs for the administration of such laws.

(c) TREATMENT OF STATE AND LOCAL GOVERNMENTS. – Nothing in this Act or the amendments made by this Act shall be construed to authorize, deputize, or commission States or local governments as instrumentalities of the United States.

(d) ENFORCEMENT WITHIN INDIAN COUNTRY. Nothing in this Act or the amendments made

by this Act shall prohibit, limit, or restrict enforcement by the Attorney General of the United States of this Act or an amendment made by this Act within Indian country.

(e) AMBIGUITY. – Any ambiguity between the language of this section or its application and any other provision of this Act shall be resolved in favor of this section.

(f) DEFINITIONS. – In this section –

(1) the term "Indian country" has the meaning given that term in section 1 of the Jenkins Act, as amended by this Act; and

(2) the term "tribal enterprise" means any business enterprise, regardless of whether incorporated or unincorporated under Federal or tribal law, of an Indian tribe or group of Indian tribes.

* * *